No. 128

IN THE SUPREME COURT OF THE UNITED STATES

PEARL McADEN,
PETITIONER,
vs.
STATE OF FLORIDA,
RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION OF THE COURT BELOW.

This brief is filed in reply to Petition for Writ of Certiorari to review a decision of the Supreme Court of the State of Florida rendered on the 30th day of January, 1945, in the cause entitled "Pearl McAden v. State of Florida." (R. 412-419). Such decision affirmed a judgment and sentence of the Circuit Court for Hillsborough County, Florida. (R. 398).

JURISDICTIONAL STATEMENT

Petitioner contends that the Court has jurisdiction under the provisions of the Act of Congress of February 13, 1925, Section 237 (b), 28 U. S. C. A., Section 344, because the case is one wherein rights, privileges and immunities secured and guaranteed to the petitioner under the Constitution of the State of Florida, as well as the Constitution of the United States, were denied him.

It is the contention of the respondent, however, that it is not competent for this Court by certiorari to review and determine this cause, for the record shows that the federal questions set forth in said petition are of such an insubstantial nature as to cause said petition to be devoid of merit and therefore frivolous, as is more particularly hereinafter set forth under "Argument of Respondent."

STATEMENT OF CASE

Petitioner, Pearl McAden, was indicted by the Grand Jury of Hillsborough County, Florida, for first degree murder, to which indictment he plead not guilty. Some days before the trial of the case petitioner filed a motion to require the State Attorney to furnish him a complete list of all witnesses to be used by the State at the trial and which list was so furnished him; thereafter, approximately three days before the date set for trial of the cause, petitioner presented a motion for subpoena duces tecum, by which motion petitioner sought the production, so as to be available to him, of a transcript of the testimony taken by and before the State Attorney at all hearings and investigations had between January 15 and February 1, 1944, concerning the killing of one Vanderhorst. The said testimony is described as:

"All the shorthand notes taken down stenographically by the official court reporter of Hillsborough County, Florida, or by any of his deputy reporters between January 15 and February 1, 1944, and all hearings and investigations held and conducted into the subject matter of the killing of Charles William Vanderhorst, Jr., in the city hall of Tampa, Florida, or at the county jail of Hillsborough County, Florida, between January 15 and February 1, 1944, as well as all of the transcriptions of said stenographic notes of said statements and testimony."

Pertinent portions of the motion for subpoena *duces tecum* are viz:

"Defendant further shows that the above cause is set for trial in the above court to begin on Wednesday, the 5th day of April, 1944, and it is of vital importance and highly material to the defense of the defendant that this official testimony herein sought be made available to him at the beginning of said trial and unless it is brought in before the court and made so available the defendant will be placed at a great disadvantage at said trial.

"Defendant further respectfully shows unto the court that he is informed and verily believes that the said witnesses, to-wit: Major Stribling, Willie Williams, Pearl Sanderson, Matthew Isom and Herman Williams, at the time of giving said testimony in said official investigation, made different statements, that is to say, each of them made entirely different material statements of fact, one of which was contradictory of the other within itself, so that each witness gave contradictory statements as to what he saw and heard, and in relation to what he knew in connection with the subject-matter here under prosecution;

: to the
that it is highly material and of vital importance d testi-
defendant that he have available this transcribe time of
mony and the stenographic notes thereof at the t may be
the trial of the above cause, so that his counsel n s above
able to properly cross-examine each of said witnesses ements
named, as well as establish the contradictory stat
made by said witnesses." (R. 6)

ıbpoena
The trial court denied the said motion for su thereof.
duces tecum upon a hearing upon the merits t of mur-
(R. 10). The defendant was tried, and found guilty
der in the second degree.

w trial,
Petitioner thereupon filed a motion for a ne n peti-
which was denied and sentence was imposed upo court of
tioner, who thereupon appealed to the Supreme C e judg-
the State of Florida, which court duly affirmed th earing;
ment of the lower court and thereafter denied a reh rtiorari.
the petitioner has applied to this court for writ of ce

ARGUMENT OF RESPONDENT

It is contended by the petitioner that a denial of his motion for subpoena duces tecum constituted a denial of due process guaranteed to him under Amendments 5 and 6 of the Constitution of the United States. Suffice it to say, that these amendments, by the principle, so often denied by this Court, have reference to powers exercised by the Government of the United States and not to those of the States and, therefore, are limited to trials in the Federal Courts.

Eilenbecker v. District Court
10 S. Ct. 424, 134 U. S. 35,
33 L. Ed. 801.

Livingston v. Moore
32 U. S., 7 Pets. 469.

Ensign v. Pennsylvania
33 S. Ct. 321, 222 U. S. 592,
57 L. Ed. 658.

Petitioner further contends that the denial to him of his motion for subpoena duces tecum denied to him the right of compulsory process vouchsafed him by Sections 11 and 12 of the bill of rights of the Florida Constitution as guaranteed to him by Amendment 14 to the United States Constitution.

Section 11 of the said bill of rights of the State of Florida is as follows:

"§ 11. *Criminal prosecutions; rights of accused*

Sec. 11. In all criminal prosecutions, the accused shall have the right to a speedy and public trial, by

an impartial jury, in the county where the crime was committed, and shall be heard by himself, or counsel, or both, to demand the nature and cause of the accusation against him, to meet the witnesses against him face to face, and have compulsory process for the attendance of witnesses in his favor, and shall be furnished with a copy of the indictment against him."

Section 12 of the bill of rights of the Constitution of the State of Florida is as follows:

"§ 12. *Double jeopardy; compelling testimony; due process of law; eminent domain.*

Sec. 12. No person shall be subject to be twice put in jeopardy for the same offense, nor compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken without just compensation."

Petitioner in his brief states that when he was denied access to the stenographic reports of the investigations taken by and before the State Attorney or the Assistant State Attorney, this was a denial of due process of law and was a fundamental right conferred upon him by the said Sections 11 and 12, and that a denial of such fundamental or organic right constituted a denial of due process guaranteed by Amendment 14 to the United States Constitution. It is the contention of the respondent that this was not the denial of fundamental rights, and therefore no Federal question is involved.

"In ascertaining what is due process, the courts have generally resorted to two sources: (1) The Constitution itself must be examined to determine

whether there is a conflict with any of its provisions, and (2) if the act complained of does not violate the constitutional provisions, the court must look to those settled usages and modes of proceedings existing in the common law and statutory law of England before the emigration of our ancestors and which are shown not to have been unsuited to their civil and political conditions by having been acted on by them after the settlement of this country. The fundamental principles referred to are those principles of judicial procedure which existed and were recognized in the courts of England and the American colonies prior to the adoption of the Federal and State Constitutions. The common law is the foundation of that which is designated as due process of law."

12 Am. Jur., Constitutional Law, par. 567.

Powell v. Alabama, 267 U. S. 45, 77 Law Ed. 158.

John Den v. The Hoboken Land & Improvement Co., 18 Howard 272, 15 Law. Ed. 372.

Petitioner has not shown and cannot show where such a denial to him is in conflict with any of the provisions of the United States Constitution.

Compelling the State Attorney prior to trial to disclose the evidence he has against an indicted person was unknown to the common law. State ex rel. Robertson v. Steele, 117 Minn. 394, 135 N. W. 1128, American Annotated Cases 1913 (d) 343 says:

"The question presented is: Shall a county attorney, prior to trial, be compelled to disclose the evidence he has against an indicted person? It must be admitted that under the common law it could not be done."

In the note to the said case of State ex rel. Robertson v. Steele, page 346, it is there stated by the annotator:

> "The holding of the reported case that the prosecution cannot prior to trial be compelled to disclose the evidence in its possession against an accused person has been settled law ever since the case of Rex v. Holland, 4 T. R. (Eng.) 691. In that case Lord Kenyon, C. J., in refusing an application by defendant for the inspection of the evidence contained in an official record intended to be produced against him on a public prosecution said that there was no principle or precedent to warrant the granting of the application and if the Court were to grant it the whole system of criminal law would be subverted. In the same case Ashurst, J., said that a defendant is entitled to no other intimation of the particular charge intended to be brought against him than what appears in the indictment or information and that it was never conceived to be necessary or fit that he should receive an intelligence of the particular evidence by which the charge is to be made out."

Florida has passed no statute upon this subject.

The petitioner in his brief discusses at length a former decision of the Supreme Court of the State of Florida, to-wit: Brown v. Dewell, 123 Fla. 785, 167 So. 687. This case is not applicable to the present case because in the said case of Brown v. Dewell:

(a) The witnesses Poulnot and Rogers had both appeared, been sworn, and had "already testified as witnesses for the State at said trial fully and thoroughly with reference to all of the matters mentioned in the said subpoena." No such predicate was laid in the present case.

(b) Said witnesses (Poulnot and Rogers) had previously before the Grand Jury "testified to material and essential facts, and made vital statements with reference to said transactions, contradictory to and wholly at variance with the testimony given by each of said witnesses before the jury in the Criminal Court of Record in Polk County, Florida, where said case is now being tried." No such showing appears in the present case.

(c) The transcript of Poulnot's and Rogers' testimony given before the Grand Jury was necessary to impeach their testimony already given before the trial jury. Such does not appear here.

(d) That the Grand Jury "had before them over one hundred witnesses in connection with the alleged kidnappings and alleged murder involved in the case now on trial; that by reason of the large number of witnesses and numerous complicated matters before them, it is impossible for counsel to secure from any juror a clear or distinct recollection as to the testimony given by E. F. Poulnot or Sam J. Rogers."

Not only is there no such showing in the present case, but no showing that counsel for McAden had talked to any of said witnesses or had tried to talk to them, or had made any effort at all to determine what they had testified to previously or would testify to subsequently.

(e) Subpoena duces tecum had, in the said Dewell case, already been issued and served on R. F. Johnson (as a defendant's witness), the reporter who had taken the testimony of Poulnot and Rogers before the Grand Jury, and

the said Johnson had appeared "in response to said subpoena, and was sworn—and stated—that he had—in his possession, the transcribed testimony—as testified to and given by each of said witnesses before the Grand Jury in reference to the matters mentioned in said subpoena, and—was willing to comply with said subpoena duces tecum—but the judge—rules that the said Johnson could not be required to turn the same over—."

No such predicate was laid in the present case.

In the Dewell case the Court said:

> "A witness before the grand jury has no privilege of having his testimony there treated as a confidential communication, but must be considered as testifying before the grand jury under all the obligations of an oath in a judicial proceeding."

In the present case the testimony sought was *not taken before a magistrate or in any judicial proceeding* but was taken before the State Attorney in an investigation taken down in shorthand by one who merely happened to be the Court Reporter. It could just as easily have been taken down by a private secretary of the said State Attorney or Assistant State Attorney. In no sense was the taking of the testimony official as so often stressed by the petitioner in his brief.

In important criminal cases, particularly capital cases such as this one, prompt investigation is essential to find the truth of the charge. It is common sense, and a fact of common knowledge, that the witnesses will give a clearer and less biased report of the facts if intelligently and fairly questioned immediately after the crime, and before intervening human influences and the frailties of memory, begin

to work. After days or weeks intervene, influences such as fear, timidity, interest, prejudice, sympathy, and animosity may color, add to, or detract from the full truth. In a few cases influences may even be set to work willfully by persons connected by blood or friendship with the parties involved, which influences are motivated by purposes discordant with truth and justice.

It is vital, therefore, to a proper administration of justice that prompt, fair, and impartial investigations be made of all charges of crime. Where such investigation establishes the innocence of the accused or a clear reasonable doubt of his guilt, the accused should be promptly released. In that event, the prosecutor has no hesitancy in showing anyone, including the defense counsel, a transcript of the evidence taken during the investigation. In his dual duty to protect the innocent as well as to prosecute the guilty, he should and will do so whenever requested. However, should such investigation establish the guilt of the accused, the prosecutor's duty to present the case to the courts and juries should not be hampered by being required to deliver defense counsel a transcript of the evidence against the accused. The law already gives the accused many procedural rights not given to the State, such as being furnished a complete list of witnesses in advance of the trial, the opening and closing argument where no evidence is offered other than that of the defendant himself, and the prohibition against the State commenting on the fact that a defendant did not take the stand. The right of appeal on all questions of law and fact are a matter of right guaranteed the defendant, while the State can appeal only from questions of law, and then only where there has been a conviction—a "moot" right seldom exercised. As a result,

some trial judges may be subconsciously inclined to rule against the State on close questions of law and fact, since the State has no appeal. Again, the defendant may present by depositions the testimony of absent witnesses, which the State cannot do.

Every official is presumed to do his duty. If a prosecutor knowingly or unwittingly violates his dual responsibility to the State and to the accused, ample recourse to the accused is available in the trial and appellate courts, Parole Commission, and the Pardon Board, as well as at the ballot. Honest, conscientious law enforcement and respect for law and order is the heart and fabric of our system of government. Ability to give such an administration of justice should not be unduly curtailed, as it would be to grant petitioner's contention.

Petitioner's motion presents no implication, much less charge, of any bad faith on the part of the prosecution. It contains no implication that the prosecution had in its possession any evidence tending to establish petitioner's innocence. Petitioner does say on page 16 of the brief in his statement with relation to the witnesses having at first told one state of facts and then changing their testimony to an entirely different version:

> "This was what was made to appear in our application for a subpoena duces tecum, and is what we would have been able to develop had Petitioner not been denied the process of this Court."

His statement is not based upon any evidence as shown by the record and is contrary to the facts in the case.

The transcript of evidence in no event could be used as substantive evidence in petitioner's behalf. The Court Reporter was never subpoenaed as a witness for petitioner or any showing made why he had not been, or any showing made that counsel had even talked or attempted to talk to him; or any showing made of any attempt to inquire of the State Attorney, or anyone else, concerning such investigation made by the State Attorney or concerning such alleged transcript thereof.

Sections 29.05 and 29.06, Florida Statutes, 1941, relate solely to *trials* in criminal cases. Section 29.05 requires the official court reporter to furnish "upon the demand of the State Attorney or the defendant in any criminal case, or the presiding judge" a "transcript of the testimony and proceedings, together with the charges of the court," and provides for his fees therefor. Said Section 29.06 provides that such stenographic report when "certified to by him as being a correct transcript of the testimony and proceedings in the case, shall be prima facie a correct statement of such testimony and proceedings; provided, that his signature to such certificate be duly acknowledged by him before a notary public or some judicial official of this State."

There is no provision in law requiring the official court reporter as such to act as a stenographer for the State Attorney in his investigations. Whoever acts as such stenographer for the State Attorney or County Solicitor does so not as an official, but as a representative of such prosecutor, and acts solely under the latter's direction. That the prosecutor employed under his direction and arrangement one who happened to hold an official position, to do something not within that official's legal duties, does not make such stenographer anything other than a representative of such prosecutor.

Many weaknesses in Petitioner McAden's motion were clearly pointed out in the able majority opinion of the Supreme Court of Florida. The burden was on movant to make a clear showing. There is no presumption which can now strengthen his motion. His motion must fail not only on its deficiencies in affirmative allegations, but on those failures to negative certain possible facts as well. These deficiencies in the motion cannot be supplied by argument or conclusions of law. The motion must contain within itself a factual situation or factual predicate sufficient to warrant its being granted. Any act done by a prosecuting officer as such, is in one sense of the word an official act, but it is not a judicial proceeding any more than are his notes or memoranda in preparation for trial a proceeding subject to the inspection of defense counsel.

Thus we see that petitioner's motion in the present case simmers down to a "fishing expedition" to secure in black and white before the trial, the testimony of State witnesses. It is not a motion for "compulsory process for the attendance of witnesses in his favor" as guaranteed under Sections 11 and 12 of the Declaration of Rights of the Florida Constitution.

The Dewell case, supra, is decisive of the present case contrary to Petitioner McAden's contentions, where the Supreme Court of Florida in the Dewell case said:

> *"Nor is this an attempt, by way of mandamus to the trial judge, to coerce the respondent judge to order turned over to the defendants' counsel, memoranda belonging to and in the possession of the State's attorney or his representatives for the purpose of enabling the defendant to prepare his de-*

fense or impeach state witnesses. If that were the case, the authorities cited in the brief of respondent, such as State v. Rhoads, 81 Ohio St. 397, 91 N. E. 186, 27 L.R.A. (N.S.) 558, 18 Ann. Cas. 415, and Havenor v. State, 125 Wis. 444, 104 N. W. 116, 4 Ann. Cas. 1052, and similar decisions, *would be in point and decisive of this case against the relators.*" (Emphasis supplied).

The testimony sought by petitioner is described as:

> "All the shorthand notes taken down stenographically by the official court reporter of Hillsborough County, Florida, or by any of his deputy reporters between January 15 and February 1, 1944, and all hearings and investigations held and conducted into the subject matter of the killing of Charles William Vanderhorst, Jr., etc."

In other words, the petitioner is seeking to be allowed to rummage through the private papers of the State Attorney.

> "The state cannot compel the prisoner at the bar to submit his private papers or memoranda to the state for use or even examination, for he cannot be required to testify in the case, nor to furnish evidence against himself. Then, why should the accused be allowed to rummage through the private papers of the prosecuting attorney? Neither the sublime teaching of the Golden Rule, to which we have been referred, nor the supposed sense of fair play, can be so perverted as to sanction the demands allowed in this case."

State -vs- Rhoads, supra.

While Sections 11 and 12 of the Declaration of Rights of the Florida Constitution guarantees "compulsory process

for the attendance of witnesses in his favor," neither Sections 11 or 12, nor any law guarantees the right for a defendant to inspect the detailed evidence of the witnesses against him in advance of the trial. The State is required to, and did in this case, furnish petitioner with a complete list of witnesses intended to be relied on by the State. This is all that the law requires.

CONCLUSION

We submit to the Court that no federal questions of merit are involved, and that respondent respectfully requests that the said Petition for Writ of Certiorari be denied.

Respectfully submitted,

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